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AN *K. Enquiry.*
1379.e.20.
INQUIRY 1-3

INTO THE
NATURE and EFFECT

Of the Writ of

HABEAS CORPUS,

The great Bulwark of *British* Liberty,
Both at Common Law, and under the
Act of Parliament,

AND ALSO

Into the Propriety of Explaining and Extending
that Act.

Nullus liber homo capiatur vel imprisonetur aut disseisietur de
libero tenemento suo vel libertatibus vel liberis consuetudini-
bus suis aut utlagetur aut exuletur aut aliquo modo destruatur
nec super eum ibimus nec super eum mittemus nisi per legale
judicium parium suorum vel per legem terræ.

Mag. Chart. C. 29.

L O N D O N:

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INQUIRY

INTO THE
NATURE AND EFFECT

HABEAS CORPUS

The great Privilege of Habeas Corpus,
Both in Common Law, and under the
Act of Parliament.

AND ALSO

into the Propriety of Extending and Enlarging

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[Price 2s.]

AN
INQUIRY
INTO THE
Nature and Effect of the Writ of
HABEAS CORPUS.

WHETHER we consider mankind as naturally inclined to social life, or as having been reduced to it by necessity or accident; from whatever cause we suppose political societies to have taken their rise, whether from the choice and compact of the many, or from the power and conquest of a few; or whether in fact the state be so formed as best to promote the happiness of every member, or to satisfy the pride and ambition of its governors; we cannot conceive it void of that principle of self-preservation, which is common to every congregation, as well as to every single body. Whether therefore the government be established on the plan of liberty or tyranny, it will certainly make some laws for the preservation of the properties and persons of the subjects, since some such are
B necessary

necessary to the very existence of the state, and without such, either more or less liberal, it wants an essential quality, and must degenerate into absolute anarchy and confusion. There is no civilized nation in the world that has not some legal institution or system, at least for the defence of the subject's body and estate against the encroachment of others of equal rank.

In those governments where certain individuals, in right of their public posts, or of their possessions, are intitled by the laws themselves to make use of the persons and fortunes of their inferiors, at their free will and pleasure (which is the case more or less in every arbitrary and despotic government) the laws relating to liberty and property are few, and extend to the preservation of them only as between private persons of equal rank in the community, and every subject still remains under the arbitrary power of his sovereign; every tenant, villein or slave, under the absolute controul of his particular lord or master: but as it is the interest of the sovereign, the lord, and the master, to protect his particular subject, tenant, or slave, from the oppression of any other than himself; you will find no country where the government is so arbitrary as not to have some laws to prevent such oppression.

On

On the other hand, under a free government, under which (if we suppose, as it is reasonable to think, society sprung from compact) all states are or ought to be. The laws in support of liberty and property are many and extensive, binding not only the common and lower class of people, but every degree and order in the state, all being subject to the same laws: and no man's liberty any further restrained than the welfare and preservation of the whole community requires.

The difference between free and arbitrary governments consists in the nature and extent of their laws for the defence of liberty and property, and not in a licence to disobey such laws as are in force; for all states, of whatever nature or origin, necessarily have this one fundamental law, that the persons and properties of its subjects are to be free from any *wrongful* or *illegal* encroachment of any other subject.

The motto which I have placed in my title page is a declaration of those liberties, which by the common law of the land every subject of the English government is and was many centuries since intitled to the full enjoyment of. It is taken out of that charter of liberties, which is by way of eminence called the Great

Charter made by King Henry the third in the year 1225, confirmed by King Edward the first, and many times ratified and inforced by subsequent acts of parliament. It has ever since its passing been considered as the fundamental plan of English liberty, so that, whatever was before the passing that charter, or is now called the common law of the land, has been considered as either founded on, or declared by, this charter : the most material article of it I have therefore chosen for my motto. And that the unlearned reader may not be ignorant on what strong foundation his liberty and property is secured to him, I shall here repeat it in English : NO FREEMAN SHALL BE TAKEN OR IMPRISONED OR BE DISSEISSED OF HIS FREEHOLD OR LIBERTIES, OR FREE CUSTOMS, OR BE OUTLAWED, OR EXILED, OR ANY OTHERWISE DESTROYED ; NOR WILL WE PASS UPON HIM OR CONDEMN HIM BUT BY LAWFUL JUDGMENT OF HIS PEERS [or equals] OR BY THE LAW OF THE LAND.

At the time this charter was passed, every man was considered as free, with respect to every other than his own particular lord, so that even he, who in respect of tenure was, with regard to the particular lord under whom he held his estate, called a villein or slave ; yet with regard to every other member of the
commu-

community, he came under the description of a freeman * ; nay the power of his own lord over him was not without restraint. But teniores by villenage being long since abolished, that distinction no longer takes place, and every subject is now to all intents a freeman. It was then and is now the common law of this land, that no freeman be deprived of life, liberty, or property, but by the law of the land, that is, by due process of law, founded on such laws as are or shall be made in restriction of the liberty of the individual, for the peace and safety of the whole community, or by the judgment of 12 men (his equals) legally impanelled and sworn to enquire of his offence. Even in those days when the martial disposition and unpolished manners of the people, and the military tenures by which lands were held were considerable restraints upon liberty, yet so tenderly was the person of the subject treated in matters of public offence, that at common law, in every criminal case without exception, every man suspected of a crime had an opportunity of retaining his liberty till after conviction, by giving security for his appearance to abide the sentence of the law †.

* 2 Institutes 45:

† In omnibus autem placitis de feloniam solet accusatus per plegios dimitti, præterquam in placito de homicidio, ubi in terrorem aliter statutum est. *Glanvill.* lib. xiii. cap. 1.

Imprisonment was warranted by the law as a security for the supposed offender's appearance to answer the charge against him, and this Imprisonment was to take place only in consequence of legal process legally issued, and by virtue of a legal warrant thereon, under the hand of some public and known officer, authorised by the law of the land to grant such warrant, such as the judges of the several courts in Westminster-hall, the justices of the peace, and the like ; and such warrant was to set forth the cause or ground of the commitment ; and whenever the party accused could procure security for his forthcoming to justice, he was intitled to be enlarged or freed from his confinement, the goal being his security only who could procure no other. Imprisonment of a freeman's person was also legal, when it was inflicted as a punishment for an offence against the public, of which the party had been legally convicted by the judgment of his peers, the sentence being pronounced by a court having jurisdiction in the cause, and authority to pass such sentence ; so that at the common law, every man was free, and had a right so to remain, unless accused of some offence ; nay, though accused, until his guilt was proved, and sentence passed on him (which could not legally pass but by the judgment of his
his

his peers) he had an opportunity to continue free upon his finding bail, pledges, or security for his appearance. But no man ought to be imprisoned but for some certain cause which is a legal ground of imprisonment; and if any man, by colour of authority, where he hath not any in that particular case, arrest or imprison another, though there might be good cause of imprisonment, yet such imprisonment is illegal, an infringement of the subjects liberty, and a breach of the law of the land *.

The right to liberty and the prohibition of an invasion of that right was general; *no freeman, no freeman whatsoever shall be taken*. The restriction of that right was particular and accidental. Every freeman was intitled as a member of the community to the enjoyment of liberty, subject to a condition or exception, in fact of his own creating, the doing some act which by the law of the land limited or took away his general right. To suppose any member of a political society to have a right without a legal means of attaining it or of regaining it when taken from him is the highest absurdity. In all well regulated states there is a power lodged with some part or other of the state to redress grievances. In England that

* 2 Institutes 52, 53, and 54.

power is legally vested in the king, who administers justice by his judges. To them therefore must there be some method of application, and from them must the party be intitled to have redress, and to have it immediately, and without hearing, if there were no law to restrain and limit the general right in particular cases. But as the title is not so general as to be without exception, there must be supposed to be some method of bringing the matter before those who have a right to determine, whether it is a case excepted out of the general law or not ; and as this can only be done by legal process or writ, it follows that such writ must necessarily result from, and be coeval with, the grant of the right. As this writ or process is to enforce a common and general, and not a particular or singular right, grounded on certain circumstances, and confined to a few members of the state ; and as it is supposed to be a process issued only for the purpose of bringing the parties, and the matter in question, before the proper judicature, where the determination is afterwards to be made, on the hearing ; the party imprisoned, or deprived of liberty, must be supposed to be *of right* intitled to such process, which is therefore called a writ of right, and the king's courts are the officinæ justitiæ, from which such processes issue.

By

By the common law of the land therefore, with the right to liberty sprung up the right of every freeman, deprived of that liberty, to have a writ of Habeas Corpus for the bringing up his body, with the cause of his detainer, before the King as administering justice by his judges ; and the end of this writ, as appears by the words of it, was, that the person imprisoned might undergo and receive whatever the court should then and there order according to law ; which Lord Coke thus explains : “ If it appeareth that his imprisonment was lawful and just he shall be remanded, but if it shall appear that he was imprisoned against the law of the land, they ought by force of the great charter to deliver him : if it be doubtful, and under consideration he may be bailed*.”

There were other methods of procuring an enlargement from prison, but these were only suited to particular cases ; the writ de homine replegiando, for taking pledges, was confined to imprisonment by sheriffs, who had a right to take bail ; the writ de odio et atia to inquire if the prisoner was accused out of hatred and malice, only related to such as were charged with homicide ; so that the Habeas Corpus

* 2 Institutes 55.

was the only general method of obtaining liberty in all cases.

That this writ of Habeas Corpus was, at common law, a writ of right, which issued out of the king's courts, and was in the nature of mesne process or ductory writs, that the party imprisoned might be brought to his answer, and have right *, appears not only from the nature and use of it, considering it as a remedial writ, not to give but to attain justice, but also from its form, being *to undergo and receive*, and reciting the confinement by way of allegation only, like other common process, being in your custody, *ut dicitur, as it is said*. It should seem that this writ issued of course till the time of Philip and Mary, a reign by no means favourable to the liberty of the subject, when it was enacted, that no Habeas Corpus should issue, unless signed by the chief-justice, or one of the judges of the court whence it issued †. But whether it issued merely of course or not, it was certainly always a writ of right, and to suppose it in the discretion of the judges of the court to grant it or not, is to suppose it not a remedial but a judicial writ, not in support of a general, but a particular right; not to bring the party

* 2 Institutes 54.

† 1 and 2 Phil. and Mary. C. 13. §. 7.

to receive judgment, but to carry it into execution. To say the power of granting it was discretionary, is to say, that the court were to determine before they had heard. At the common law, even 1000 years since in the time of king Alfred, The mirror of justices, the most antient book in the law, says, that there was no such thing as a writ of favour, for they were all remedial writs, grantable as of debt, as due of right *. The words of Statute of 36 Edward III, are " if any man
 " that feeleth himself grieved, contrary to any
 " of the articles abovewritten, or others contained in divers statutes (among which Magna Charta is mentioned) will come into the
 " chancery, or any for him, and thereof
 " make his complaint, he shall *presently* there
 " have remedy by force of the said statutes." And by the statute of Marlbridge, made 52 H. III. and cited in the abovementioned act, it is enacted, " that all writs shall be freely
 " granted." In the beginning of the reign of king Charles I. though the judges thought fit to remand Sir Walter Earl, who was brought up to the bar of the court of Kings-Bench on a writ of Habeas Corpus, directed to the warden of the Fleet, who returned

* In temps le roy Alfred n'estoit nul brief de grace, eins fueront tous briefs remedials grantable come de Det. Mirr. C. 5. S. 1.

that he was committed and detained by Majesty's special command, and held the cause of detainer sufficient ; yet they made no question of the prisoner's right to the Habeas Corpus. And though the judges of those times seemed to be desirous as much as possible to support the crown in its arbitrary proceedings, yet they never refused the writ of Habeas Corpus ; but had it been then a doubt whether it were a writ of right or not that has been sufficiently cleared by the second resolution of the house of commons unanimously passed there, and which the managers for that house supported and proved by several statutes and many precedents to be the law of the land at a conference with the house of lords ; and upon which and other resolutions the famous petition of right was formed. It is there resolved " That the writ of Habeas Corpus *may*
 " *not be denied*, but ought to be granted to every
 " man that is committed or detained in prison,
 " or otherwise restrained, though it be by the
 " command of the king, the privy council, or
 " any other, he praying the same.

The petition of right presented by the lords and commons in parliament assembled, which by the king's answer and assent gained the form and force of an act of parliament, is too notable a declaration of the rights and liberties of
 the

the subject, to be passed over : That petition stating, that “ against the tenor of the Great
 “ Charter, and other the good laws and statutes of the realm there mentioned diverse
 “ of his Majesty’s subjects had of late been
 “ imprisoned, without any cause shewn ; and
 “ when for their deliverance they were brought
 “ before his Majesty’s justices, by his Majesty’s writ of Habeas Corpus, there to undergo and receive as the court should order,
 “ and their keepers commanded to certify the causes of their detainer, no cause was certified, but that they were detained by his
 “ Majesty’s special command, signified by the lords of his privy council, and yet were returned back to their several prisons, without being charged with any thing, by which
 “ they might make answer according to the law ; It is prayed (among other things)
 “ and, by his Majesty’s assent to that prayer, provided and enacted, That no freeman be
 “ in any such manner as is before mentioned imprisoned or detained *. Notwithstanding this solemn assertion, and acknowledgment by the crown, of the rights and liberties of the subject, a small acquaintance with the history of those times will convince us, that those liberties were often infringed, both in the reigns

* Statutes at large, 3d Charles I.

of Charles the First and Second : but it does not appear that the exertion of arbitrary power was ever so far countenanced by the judges of the king's courts as to induce them, in any case, to refuse the writ of Habeas Corpus to one imprisoned by any authority whatever. And in the 29th year of king Charles the Second about two years before the passing the Habeas Corpus act, in the famous case of my lord Shaftsbury *, when he and two other lords, having been committed to the tower by the house of lords, for a contempt of that house, and having obtained a Habeas Corpus, the cause of detainer was returned, and the sufficiency of the cause argued at the bar by serjeant Maynard and the king's attorney and solicitor general, in maintenance of the return, when not one of them disputed the Earl's right to the writ, but on the contrary Winnington, the solicitor general, expressly said, " That the court was obliged *in justice* " to grant the Habeas Corpus."

From what has been said, I hope it sufficiently appears, that by the common law of this land, confirmed by various acts of parliament, every subject restrained or deprived of personal liberty has a right to have *freely and*

* 1 Mod. Rep. 156.

without denial a writ of Habeas Corpus, to be issued out of and returnable in the court of kings bench in term time, and out of the chancery in vacation, directed to the goaler, or other person in whose custody he is, for the bringing him into either of the said courts, with a certificate or return of the cause of his detainer; that if it appear, upon such return, he was wrongfully committed or confined, or by one that had not jurisdiction, or for a cause for which a man ought not to be imprisoned, he may *and ought*, by such court, to be discharged from his imprisonment, or if legally committed for a baileable offence, be bailed, or if for an offence not baileable by law, be remanded. It some how or other became the custom of the courts to grant a second and third writ of Habeas Corpus before they enforced the return by granting process against the person who ought to have made it, in order to punish his disobedience. From this custom, which in many cases rendered the remedy entirely useless, as well as from the impossibility of procuring a Habeas Corpus, except out of chancery, in the vacation time, and the difficulty of getting it in that court in the middle of a vacation, when the lord chancellor or keeper might be at a distance from London, and also from the uncertainty of obtaining a speedy return of it when issued,

and

and the still greater delay occasioned by the practice of allowing a second and third writ, and no less from the influence of the crown over the then judges and goalers, and from many, then recent, instances of the arbitrary designs of king Charles the second's governors. The parliament found it necessary in the 31st year of his reign, to pass that statute, which is called the Habeas Corpus act, but which is properly intitled, An act for the better securing the liberty of the subject, and has been always esteemed *the great bulwark of English liberty*. Whereby, after reciting * “ That great delays
 “ had been used by sheriffs, goalers, and other
 “ officers, to whose custody any of the king's
 “ subjects had been committed for criminal or
 “ *supposed criminal* matters, in making returns
 “ of writs of Habeas Corpus, to them directed, by standing out an alias and plures, and
 “ sometimes more, and by other shifts, &c.
 “ contrary to their duty, and the known laws
 “ of the land, whereby many of the king's
 “ subjects had been, and thereafter might be
 “ long detained in prison; for the prevention
 “ thereof, and for the more speedy relief of
 “ all persons imprisoned for any such criminal
 “ or supposed criminal matters, It was enacted

* Statutes at large 31 Charles II. c. 2.

“ ted, that whensoever any person or persons
 “ should bring any Habeas Corpus, directed
 “ unto any sheriff, goaler, minister, or other per-
 “ son whatsoever, for any person in his or their
 “ custody; and the said writ should be served
 “ on such officer, or left at the goal, such of-
 “ ficer, &c. should under the penalty of one
 “ hundred pounds for the first offence, and
 “ two hundred pounds and incapacity to hold
 “ his office for the second, within three days
 “ after service thereof, unless the commitment
 “ were for treason or felony plainly and speci-
 “ ally expressed in the warrant of commit-
 “ ment, upon payment or tender of the
 “ charges of bringing the prisoner up, to be as-
 “ certained by the judge or court, who award-
 “ ed the writ, and security given for the par-
 “ ty’s going back, and not escaping (if re-
 “ manded) make return of such writ and
 “ bring the body of the party so committed
 “ or restrained before the lord chancellor &c.
 “ or such other person, before whom the said
 “ writ was made returnable according to the
 “ command thereof; and likewise then cer-
 “ tify the true causes of his detainer and im-
 “ prisonment, unless the place of confinement
 “ were above twenty miles distant from such
 “ court &c, but if above twenty miles, and
 “ within one hundred, then within ten days,
 “ and if above one hundred miles, then
 D within

“ within 20 days and not longer. And that
 “ if any person so standing committed or de-
 “ tained in vacation time, other than persons
 “ convict or in execution, or any one on his
 “ behalf complained to the lord chancellor,
 “ or lord keeper, or any one of his Majesty’s
 “ justices, either of the one bench or of the
 “ other, or the barons of the exchequer of the
 “ degree of the coif, the said lord chancellor
 “ &c. or any of them, upon view of the copy
 “ of the warrant of commitment or detainer,
 “ or otherwise upon oath made that such copy
 “ was denied to be given by the person in
 “ whose custody the prisoner was detained,
 “ were authorised and required under the pe-
 “ nalty of 500 pounds, upon request made in
 “ writing by such person or any on his behalf
 “ attested and subscribed by two witnesses,
 “ who were present at the delivery of the same,
 “ to award an Habeas Corpus under the seal
 “ of such court, whereof he should then be
 “ one of the judges, to be directed to the offi-
 “ cer &c. in whose custody the party should
 “ be, returnable immediately before the lord
 “ chancellor or such justice, &c.” to be re-
 turned as aforesaid within the times abovementioned,” and the chancellor or such justice &c.
 “ before whom the said party was brought
 “ should discharge him from his imprison-
 “ ment, taking his recognizance with one or
 more

“ more sureties in any sum, according to their
 “ directions, having regard to the quality of the
 “ prisoner and nature of the offence, for his
 “ appearance in the court of king’s bench
 “ the term following, or at the next assizes, &c.
 “ or in such other court where the offence is
 “ properly cognizable, as the case shall re-
 “ quire, unless it shall appear unto the said
 “ lord chancellor &c. that the party so com-
 “ mitted is detained upon a legal process, or-
 “ der, or warrant, out of some court that hath
 “ jurisdiction of criminal matters, or by some
 “ warrant signed and sealed with the hand and
 “ seal of any of the said justices or barons, or
 “ some justice of the peace, for such matters
 “ or offences for which by law the prisoner is
 “ not baileable.”

This act was made in affirmance of the li-
 berty of the subject, and ought to be construed
 liberally, and as far as either the intent appears,
 or the words will by any means bear such con-
 struction, so as to make it if possible coexten-
 sive with the wants of the subject. It does
 not in fact enlarge or extend the subject’s com-
 mon law right to the writ of Habeas Corpus,
 but is only calculated to give a more speedy
 relief. It should seem therefore to admit of
 that equitable construction which brings with-
 in the reach of the remedy whatever is within

the grievance. If it is construed according to these rules, it may, I conceive, not improperly be extended to all cases of restraint (except upon civil process) whether it be under any warrant or not, or whether the confinement be by a public officer or private person. The statute indeed is not very accurately penned, and the second and third sections (the two which I have above quoted) seem to be transposed: but from the general title, and from the words, "or other persons whatsoever," being added after the words "sheriff &c.," in the second section it should seem as if the words "criminal offence" were intended to be used in opposition to civil process. The legislature understanding that there was a Habeas Corpus which issued in civil cases to remove prisoners on arrest for debt from one goal to another, and to remove their causes out of inferior courts; and that there could be no *legal* confinement except either on supposition of some crime, or under the authority of 52 Henry the third C. 23. and 25 Edward the third, C. 17. which gave the creditor a right to attach the person of his debtor by civil process; and as the law knows of no other cause of imprisonment, the legislature might think it sufficient to distinguish between these two cases, so as to shew they did not intend to take in the latter, which it was unnecessary

cessary to do, as it had been always usual to issue Habeas Corpus's in civil cases in vacation time, and to enforce as speedy an obedience to them as was necessary. And the preamble of the act, referring to only one species of imprisonment within the former case, can hardly be a sufficient ground for limiting the meaning of the subsequent general enacting words.

The rule is, to construe penal statutes literally and strictly, but remedial acts equitably and liberally, in such a manner as to make them most beneficial to the subject. And upon this foundation many writs of Habeas Corpus have since the passing this act been awarded in vacation time, even where there was no colour or pretence of legal process, or supposed crime against the public, but where the confinement was by a private person, for some private end to himself. And this has, I am informed, been the general and almost universal practice; but some doubts having arisen as to the true meaning of the statute, whether or no it extended to any other cases than commitments and detainers for criminal or supposed criminal matters, relating to the public, by some public officer, under colour of some legal process or warrant, a bill is now depending in parliament to extend the provisions in the statute of Charles II. and some others

others to all, except civil, cases, and those expressly excepted in that act.

The uncertainty of the law is in all cases highly inconvenient, but more especially so where liberty, an enjoyment as dear to a true Briton as life itself, is concerned. To clear up any such doubt must be not only proper, but necessary. On the bill now depending a question has arose whether the provisions in the statute of 3rd Charles the second ought to be declared to extend to all cases of confinement, except upon civil process, or whether they should not be confined to commitments for supposed crimes against the public, by a public officer, under colour of some warrant.

The impropriety of so narrowly confining the benefit of that act appears from the very case which gave rise to the doubt, and application for removing it, I mean the case of a man confined as impressed by the commissioners under the late act * for the better recruiting his Majesty's land forces and marines, " by which
 " the justices of peace and commissioners of
 " land tax are impowered to meet, and any
 " three of them, to raise and levy all *able-bo-*

* 30 Geo. 2. C. 8.

" *died*

“ *died, idle and disorderly* persons, who cannot
 “ upon examination prove themselves to ex-
 “ ercise and industriously follow some lawful
 “ trade or employment, or to have some sub-
 “ stance sufficient for their support and main-
 “ tenance, to serve his Majesty as soldiers, with
 “ an express exemption of every one who has
 “ a vote for member of parliament;” sup-
 posing a man taken up under this act in the
 middle of the long vacation, he may indeed
 procure a Habeas Corpus out of chancery, but
 that can’t be returnable till the next sitting of
 the court, which may not be till some weeks
 after, and then how can he enforce an obedi-
 ence to this writ; so that, however improper
 an object of the act, however unjustly or par-
 tially impressed, he may be sent abroad as a
 marine long before the writ is returnable, or
 at least long before the return of the second
 and third Habeas Corpus. The act gives the
 commissioners a *limited* jurisdiction only, and
 to say, they can’t be supposed *ever* to exceed it,
 is arguing against fact.

Suppose another case, a man who has a vote
 for members of parliament, and whose incli-
 nations are known, may be sent just before the
 election to some distant place, and there con-
 fined against his will in a private house, in or-
 der

der to prevent his coming to vote, a case which has in fact more than once happened.

Suppose a wife, child, or Servant, is used with the utmost brutality, and in order to prevent an application to any friend, is confined to the house of the husband, parent, or master, with the utmost risk of life, and this is a case which is too frequent.

In every one of these cases, and in many other instances, any delay in awarding or returning of the Habeas Corpus, may be attended with the most fatal consequences to the persons under restraint, and, by reason of such delay, the relief intended to be given may come too late for such person to be discharged from his restraint, or to receive any benefit from such writ.

If the act of 31 king Charles II. does not extend to all cases of confinement, why should it not? if imprisonment by a *public and known* officer for a supposed criminal offence, not being treason or felony, under a written warrant, requires a speedy relief, why is there not the same necessity, in case of confinement for a limited particular purpose, or by a private person, who has not the least shadow of authority? That act was made in order to render the remedy easy and speedy, why should it not be

be so in all cases where the liberty of the Subject is concerned.

Under the reign of his present Majesty, in pursuance of that mild system of government which has prevailed since the revolution, there is less likelihood of infringement of liberty by the crown, than by limited inferior jurisdictions, or private persons.

It is not proposed to give a Habeas Corpus where there was none before, but only so to regulate the method of allowing and returning it in *all* cases, as to make it useful and beneficial to the party injured. It is not designed to take away any discretion *which the courts or judges had at common law, or under the act of Charles II.* for I have already shewn, that the awarding of the writ of Habeas Corpus was due of right, and by no means discretionary ; and the judge at his chambers will still have it in his power in doubtful cases not to determine upon the return himself, by obliging the party before he is discharged from actual imprisonment to enter into a recognizance with sureties for his appearance in the proper court, there to abide the determination of such court.

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It

It has been objected, that if the provisions in the act are extended to all cases, it may encourage the applying for a Habeas Corpus, in order only to harass and trouble the party to whom it is directed, and to put him to considerable expence, or in cases where there is no other confinement than what is necessary for family government, as for instance, to prevent a wife or disobedient daughter running away with a gallant ; and that it would be better in such cases to leave it as it was at common law to the court to use their discretion whether to grant the writ or not. To the first part of the objection I answer, that the suing a Habeas Corpus for vexation only is never likely to be the case, because the suing it out is attended with some Expence, the charge of bringing the party up to be bailed, which must be paid by him who applies for the Habeas Corpus, is very considerable ; and it is made necessary, by the bill now depending, that there should be an affidavit, either by the party confined, or some other on his behalf, of the actual confinement or restraint. All which circumstances will sufficiently prevent the praying writs of Habeas Corpus for vexation, or on frivolous occasions, or in short in any case where the family government is not carried beyond the bounds of prudence, or the laws of the land made for the preservation of liberty

liberty and property. But supposing such a case as is objected may now and then happen, is not every remedial process in all, even in civil, cases liable to the same, if not much greater abuse. And was it ever held a sufficient reason against giving a *general* power or right of redress that the exercise of that right might in *some* cases be abused, and rarely or accidentally be productive of an inconvenience to a particular person.

As to the objection, which arises from the supposed abridgment of the court's discretion, I think I have already answered it by shewing, the common law allowed of no such discretion in awarding the writ of Habeas Corpus, especially where such affidavit was made of actual restraint, as is directed by the bill now depending. Upon the return there will be the same legal and sound discretion in the judge either to remand discharge or bail the party, as was in the court at common law. And this is an answer also to that argument against the bill, which is founded on what is truly, and cannot be too often, said of the learning, integrity, and regard to the subjects liberties, which distinguish the present judges upon all the benches. And what can be a more proper time for adding this further security (if there was not such before) for the liberty of the subject, than when

when the general approbation of the uprightness of the crown and its judges shows, that the measure does not proceed from any distrust or suspicions of them, but is intended only to strengthen their hands, and enable them to act according to what every one is satisfied is the desire of their hearts, and to secure the liberty of the subject in future times, when we may not happen to have a king and judges so tender of the rights of the people; whereas, to introduce such a bill in a perilous time, or reign of oppression, might, (as was the case in the reigns of Charles the first and second) occasion great disputes and jealousies between the king and his parliament.

It is said also, That as the subject's liberty is secured against the oppression of the crown in all criminal cases by the Habeas Corpus act, as it now stands, even if you construe it in the most narrow sense, that is sufficient, and it is by no means *necessary* to extend it any farther; but that in other cases the party may be properly left to his action of false imprisonment. To this I answer, That in cases where the pretended authority is exercised by many persons, as it may be under the recruiting act, it will be very difficult and expensive to bring the action. In the case of a wife, it cannot

cannot be brought against her husband. In almost all cases, the poverty or inferiority of the party imprisoned, in comparison with the wealth or power of the person by whom he is imprisoned, renders it impracticable or imprudent to commence this action, which can only procure damages, and not a release from confinement; and that in many cases the true *quantum* of damages cannot be ascertained, nor *sufficient* damages given: and in many other cases, it may be suing a beggar at a certain expence: and, too much can scarce be done to secure the liberty of the subject.

Upon the whole then, I conclude, that the writ of Habeas Corpus is every Englishman's right in *all* cases of confinement or restraint, that it ought to be as easily and speedily awarded and returned as possible in *every* case; and that as there has arisen a doubt, whether the statute of 31 Charles II. extends to all cases, that doubt ought to be removed by some express law, extending the same or more advantageous provisions to every commitment or restraint of liberty (except in civil cases, and in case of treason or felony, plainly expressed in the warrant) by whatever person or authority that commitment, confinement, or restraint, may be.

It

It will not be I hope, improper, before I conclude, to submit it to the opinion of the legislature, whether the act should not give a power to the person before whom the Habeas Corpus is returnable, at least in private cases, at his discretion, upon the return to award to the party injured such costs and charges as he has been out of pocket, or paid for the procuring the Habeas Corpus, and for bringing him up; and whether also the new act should not be framed in such a manner as not to imply that the statute of Charles II. did not extend to *all* cases, as the general practice has been *so* to construe it.

ERRATUM.

Pag. 5. line 4. for *teniores* read *tenures*.

P I N I S.

